

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS JAMES BURKEEN,

Defendant-Appellant.

UNPUBLISHED

July 27, 2001

No. 223450

Wayne Circuit Court

LC No. 98-012741

Before: Wilder, P.J., and Hood and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of felonious assault, MCL 750.82, for which he was sentenced to two years' probation. We affirm.

Defendant's theory of the case was that he acted in self-defense. He contends on appeal that trial counsel was ineffective because he did not call other witnesses to testify that they had witnessed the victim engaging in acts of violence and had informed defendant of his reputation for violence. Because defendant did not raise the issue of ineffective assistance of counsel below, review is limited to mistakes apparent on the record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 314; *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The defendant must also overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id.*

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the

benefit of hindsight.” *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). “Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense.” *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 581 NW2d 1 (1997).

Based on the record presented, we are unable to conclude that defense counsel was ineffective. Because the record is silent as to who the proposed witnesses were and what they told defendant, defendant has not shown a reasonable probability exists that, if counsel had called the witnesses, the outcome of the proceedings would have been different. *Avant, supra* at 508. That aside, the witnesses’ testimony regarding specific instances of the victim’s conduct would not have been admissible. *People v Harris*, 458 Mich 310, 320; 583 NW2d 680 (1998). Although the witnesses could have testified regarding the victim’s reputation for violence, *id.* at 316, defendant himself testified to the effect that he had heard the victim was dangerous. Therefore, counsel’s failure to call the witnesses did not deprive defendant of a substantial defense.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Harold Hood
/s/ Richard Allen Griffin